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 1          IN THE SUPREME COURT OF THE UNITED STATES

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 3     MONROE ACE SETSER,                    :

 4              Petitioner                   :

 5          v.                               :   No. 10-7387

 6     UNITED STATES                         :

 7     - - - - - - - - - - - - - - - - - x

 8                          Washington, D.C.

 9                          Wednesday, November 30, 2011

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11              The above-entitled matter came on for oral

12     argument before the Supreme Court of the United States

13     at 10:03 a.m.                          `

14     JASON D. HAWKINS, ESQ., Assistant Federal Public

15          Defender, Dallas, Texas; on behalf of Petitioner.

16     WILLIAM M. JAY, ESQ., Assistant to the Solicitor

17          General, Department of Justice, Washington, D.C.; for

18          Respondent, in support of Petitioner.

19     EVAN A. YOUNG, ESQ., Austin, Texas; for amicus curiae,

20          in support of the judgment below; Appointed by this

21          Court.

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1   P R O C E E D I N G S

2   (10:03 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Case 10-7387,

5   Setser v. United States.

6   Mr. Hawkins.

7   ORAL ARGUMENT OF JASON D. HAWKINS

8   ON BEHALF OF THE PETITIONER

9   MR. HAWKINS: Mr. Chief Justice, and may it

10   please the Court:

11   This case concerns whether, in passing the

12   Sentencing Reform Act of 1984, Congress granted to the

13   Federal district court the authority·to order its

14   Federal sentence to run consecutively to a -- a sentence

15   which has yet to be imposed and may never come to

16   fruition. The text of 3584, its structure and its

17   history all point to the conclusion that the court lacks

18   this power.

19   We believe the question should start and end

20   with the statute's text. When a defendant receives

21   multiple terms of imprisonment, they must bear one of

22   three relationships to each other. Either one is

23   imposed before the other, the other is imposed before

24   the one, or they are imposed at the same time.

25   In --

1   JUSTICE SOTOMAYOR: Counsel, in the third

2   sentence of this provision, on its face, does Mr. Setser

3   fit into it?

4   MR. HAWKINS: No, Your Honor. He does not.

5   JUSTICE SOTOMAYOR: "Multiple terms of

6   imprisonment imposed at different times run

7   consecutively." What is unclear about those words?

8   MR. HAWKINS: Your Honor, that term can

9   only --

10   JUSTICE SOTOMAYOR: The words are not

11   unclear. We have to do the statutory interpretation

12   that you want?

13   MR. HAWKINS: Your -- Your Honor, the words

14   can only be read in the context of the first -- of the

15   first sentence. We believe that the third sentence only

16   applies where the Court had the authority to actually

17   order this but remained silent.

18   JUSTICE SOTOMAYOR: Some fairly respected

19   jurists below, Judge Easterbrook and Judge Fletcher, two

20   different circuits, have read it as taking care of all

21   those situations that the other two sentences don't

22   cover. Why is that an irrational reading?

23   MR. HAWKINS: Your Honor, I -- I think it

24   has to be read -- the third sentence has to be read in

25   its place within the statute, and I think that the third

 1   sentence refers exclusively to circumstances where the

 2   defendant was already serving another term of

 3   imprisonment at the time of the Federal sentencing. I

 4   think we know this because of the parallel structure of

 5   3584(a). It --

 6   JUSTICE SOTOMAYOR: But that assumes the

 7   answer, is what I'm saying to you. If you give each

 8   sentence its plain meaning, why is -- why is Mr. Setser

 9   not within the plain meaning of the third? He -- he had

10   multiple terms of imprisonment, imposed at different

11   times.

12   MR. HAWKINS: Yes, but those terms of

13   imprisonment weren't -- there was no·term of

14   imprisonment imposed at the time of his Federal

15   sentencing. He was not serving an undischarged term of

16   imprisonment. And we believe that the natural flow of

17   the statute, the default rule only comes in place if the

18   court had the power to sentence under the first

19   sentence.

20   JUSTICE KENNEDY: You would say that at the

21   time of sentencing, there were no multiple terms of

22   imprisonment. Is that your point?

23   MR. HAWKINS: That is correct, Your Honor.

24   At the time of the Federal sentencing, Mr. -- Mr. Setser

25   was not subject to an undischarged term of imprisonment.

1   JUSTICE GINSBURG: What difference does it

2   make for him? He served his State time. He came over

3   to serve his Federal sentence. He didn't get credit for

4   the 2-1/2 years he spent in -- in State. But what is

5   the consequence? How much -- what is the difference to

6   the defendant in this case?

7   MR. HAWKINS: Your Honor, we -- we believe

8   that the order, what the order did was bind the court.

9   I'm sorry, the -- the order bound the Bureau of Prisons.

10   And so what it does -- what happens is, Mr. Setser is

11   not able to petition the Bureau of Prisons to allow that

12   sentence to begin running from the time of the Federal

13   sentencing. So the difference, Your Honor, is 1 year,

14   6 months, and 23 days that we believe that he is

15   entitled to credit for.

16   JUSTICE SCALIA: And this is --

17   JUSTICE GINSBURG: Entitled to credit or you

18   could seek it? I mean, what would it -- he has the

19   State time and he -- 2-1/2 years, and then he has his

20   Federal sentence. Why would you be entitled to any

21   credit?

22   MR. HAWKINS: Because -- because, Your

23   Honor, the court ordered that the -- the Federal

24   sentence to run concurrently to that 10-year sentence

25   that he received in State court. And so we believe he

1   is entitled to credit for that -- for that sentence.

2   JUSTICE ALITO: In situations like this,

3   somebody is going to have to make the decision whether

4   the Federal sentence and the subsequently imposed State

5   sentence run concurrently or consecutively. And now

6   you're arguing that that should be done by the Bureau of

7   Prisons. Do you think in general that is better for

8   defendants than a rule that would allow the sentencing

9   judge in Federal court to make that determination?

10   MR. HAWKINS: Your Honor, in our estimation

11   the question is not the who, but the when. And at the

12   time, at the Federal sentencing, the Federal judge did

13   not have the complete information to make the proper

14   judgment in this case. He had no idea what that State

15   term of imprisonment was going to be. So in our

16   estimation, it is better that -- that the Bureau of

17   Prisons has all the information to make this decision.

18   It will actually know what the State term of

19   imprisonment is.

20   I'm not here to advocate that the system

21   that the Bureau of Prisons uses -- uses is perfect --

22   JUSTICE ALITO: Why would the -- why would

23   the exact length of the sentence imposed by the State

24   court be relevant to the determination made by the

25   sentencing judge? I thought the sentencing judge's

1   reasoning was that the -- the undischarged term of

2   imprisonment that was going to be imposed on the offense

3   for which probation had previously been granted and

4   there had been a violation of the probation, that that

5   had nothing to do with his subsequent Federal drug

6   charges, and therefore the Federal drug charges should

7   run consecutively to that, but should be concurrent to

8   any sentence imposed by the State court on the State

9   drug charges.

10   What -- you know, what's wrong with that

11   reasoning, and what additional insight relevant to that

12   reasoning would be obtained by waiting until after the

13   sentence was imposed?   `

14   MR. HAWKINS: Well, Your Honor, at the time

15   that the Federal judge passed this sentence, he had no

16   idea what was going to happen in either case. But more

17   importantly, with regard to the term of probation, the

18   Federal judge had no idea whether that term was going to

19   be revoked, whether it would be modified, or whether he

20   would receive any sentence of -- of imprisonment at all.

21   And in making the judgment on whether those

22   terms should run concurrently or consecutively, Your

23   Honor, 3584(b) directs the Court to look at the factors

24   of 3553(a) in making that determination. And it would

25   be impossible to make that determination under 3553(a)

1   whether the sentence is adequate to deter, whether that

2   sentence protects the public, without knowing what that

3   State term of --

4   JUSTICE ALITO: Well, that's interesting.

5   MR. HAWKINS: -- imprisonment actually is.

6   JUSTICE ALITO: Do you think that the Bureau

7   of Prisons is bound by those factors when they make the

8   decision later?

9   MR. HAWKINS: Your Honor, the -- the Bureau

10   of -- of Prisons is bound by the factors of 3621(b), and

11   several of those factors match up with the factors in

12   3553(a). It has to look at the nature and circumstance

13   of the crime, the characteristics of the defendant. It

14   has to look to the United States Sentencing Guidelines,

15   and it also has to take in the view of what the Federal

16   judge believes should have happened.

17   JUSTICE SCALIA: Where is --

18   MR. HAWKINS: And to the extent --

19   CHIEF JUSTICE ROBERTS: Where is all that

20   that you just read, that they're bound by all these

21   things? Where do I find that?

22   3621(b), is it cited in any of your briefs?

23   Or pardon me. Is 3621(b) set forth in any of the

24   materials?

25   I have it in front of me, but I -- is it

1   in the government's brief or --

2   MR. HAWKINS: Your Honor, I believe it is

3   in -- in the Solicitor General's -- in the appendix to

4   the Solicitor General's brief, Your Honor.

5   CHIEF JUSTICE ROBERTS: Well, I'm looking

6   at -- I guess I got this off -- somebody got this

7   off-line for me. I am looking at the program statement

8   of the Bureau of Prisons. And it says what the regional

9   directors are supposed to look at is the intent of the

10   Federal sentencing court or the goals of the criminal

11   justice system.

12   So you've got some guy deciding whether the

13   goals of the criminal justice system·require this person

14   to serve an extra 10 years or not?

15   MR. HAWKINS: Well, Your Honor, I think that

16   what the -- the law requires is that the Bureau of

17   Prisons has to look at these factors under 3621(b), and

18   those program statements are trying to define what those

19   exact factors are.

20   CHIEF JUSTICE ROBERTS: I mean, doesn't it

21   seem strange to you that a Federal bureaucrat sitting, a

22   regional director -- I guess there are about a half

23   dozen of them -- sits somewhere and decides whether a

24   defendant -- say there's a 10-year Federal sentence,

25   10-year State sentence, and that person says, well, I

1   think he ought to serve another 10 years or I think he's

2   done.

3   MR. HAWKINS: Well, Your Honor, to -- to be

4   clear, I mean, Mr. Setser is going to have to serve a

5   151-month term of imprisonment no matter what. But the

6   bureaucrat that -- that you are talking about, the

7   bureaucrat will be -- only be making that determination

8   after having the complete information which the Federal

9   judge --

10   CHIEF JUSTICE ROBERTS: Well, I know, but --

11 but it's a big deal to be sentenced to, in my

12 hypothetical, another 10 years in prison. I don't care

13 how much information the bureaucrat has.

14   MR. HAWKINS: Well, Your Honor, but still,

15 that -- that person has the -- has the information

16 before it, and it's also subject to judicial review

17 under 2241. I -- I would point out that there is a

18 process where the Petitioner can -- or the prisoner can

19 ask for this --

20   JUSTICE SOTOMAYOR: But judicial review of

21 what? Not of the -- not of whether that was the desire

22 of the State court or not. Judicial review as to

23 whether they abused their discretion?

24   MR. HAWKINS: Yes, Your Honor. And I

25 believe that's -- that's the same discretion that the

1   Court has when its deciding a sentence on direct appeal.

2   JUSTICE SOTOMAYOR: So you are going to make

3   a bureaucrat equal to a judge in making the most

4   important decision that a defendant faces: How much

5   time he should spend in jail. So a bureaucrat rather

6   than a judge decides whether he's going to tack on a

7   year and a half, 5 or 10, or whether he's going to let

8   the defendant serve it concurrently?

9   MR. HAWKINS: Your Honor, again, it -- it's

10   not the who for us, but the when.

11   JUSTICE SOTOMAYOR: It's not -- it's not a

12   who or when, because the State court judge's

13   recommendation is not binding on BOP. It has said that

14   repeatedly, hasn't it?

15   MR. HAWKINS: Your Honor, I'm aware of no --

16   JUSTICE SOTOMAYOR: Just answer that

17   question. Hasn't BOP said that a State court

18   recommendation is not binding on it?

19   MR. HAWKINS: That -- that is correct, Your

20   Honor. But I -- I would point to the fact that --

21   what that -- I mean --

22   JUSTICE SOTOMAYOR: So it can't be just who

23   -- it can't be just when. It's who's going to make the

24   decision.

25   MR. HAWKINS: Well, yes, Your Honor. But

1   the bureaucrat at least has all the information before

2   it. And if we go to --

3   JUSTICE SCALIA: Well, isn't it true that

4   the bureaucrat used to make that decision not too long

5   ago?

6   MR. HAWKINS: Yes, Your Honor.

7   JUSTICE SCALIA: When we had the parole

8   system. Before we had the sentencing guidelines, it was

9   up to the Bureau of Prisons whether to give parole or

10 not, right?

11   MR. HAWKINS: Yes, Your Honor.

12   JUSTICE SCALIA: Some bureaucrat in the

13 Bureau of Prisons, I guess.   `

14   MR. HAWKINS: Yes, Your Honor, along with

15 good time credits --

16   JUSTICE SCALIA: It's not unthinkable.

17   MR. HAWKINS: No, Your Honor, prior to the

18 passage of the SRA, the --

19   JUSTICE SOTOMAYOR: But wasn't the SRA

20 passed and this provision passed in part to take that

21 decision away from the bureaucrat?

22   MR. HAWKINS: Well, it was a -- it was

23 passed to take the decision away from the bureaucrat,

24 that the courts could not order a Federal sentence to

25 run concurrently with an undischarged State term of

 1   imprisonment. That gave that power back to the court.

 2   JUSTICE SOTOMAYOR: Well, let's answer

 3   Justice Scalia's point. Wasn't the SRA passed in part

 4   because of the dissatisfaction with the fact that the

 5   parole board used to make this decision, and they wanted

 6   to put it back in the hands of judges?

 7   MR. HAWKINS: That's part of the reason,

 8   Your Honor. But in passage of 3621 it also highlighted

 9   the fact that it was not seeking to take away the

10   bureaucratic authority that the Bureau of Prisons has

11   for designation. And back to the --

12   JUSTICE SOTOMAYOR: I don't know why it

13   takes away from them on that score. ·They can choose

14   whatever facility they want within the constraints

15   imposed by a judge in terms of the length of the

16   sentence.

17   MR. HAWKINS: Well, I mean -- I guess, yes,

18   Your Honor, that is part of it, but that only comes into

19   play when the first sentence does not apply and when the

20   court does not have the requisite information. In our

21   estimation it is better for the latter sentencing

22   entity, that with the most sentencing information, to be

23   able to make this -- this ultimate determination in --

24   in looking at the Federal court's views, versus allowing

25   a Federal judge who's prognosticating about what the

1   sentence might be and issue a binding order.

2   And if there are no further questions, I

3   will reserve the remainder of my rebuttal time.

4   CHIEF JUSTICE ROBERTS: Thank you, counsel.

5   Mr. Jay.

6   ORAL ARGUMENT OF WILLIAM M. JAY,

7   ON BEHALF OF THE RESPONDENT,

8   IN SUPPORT OF THE PETITIONER

9   MR. JAY: Mr. Chief Justice, and may it

10   please the Court:

11   Federal district courts do decide how long a

12   defendant should be in prison for his Federal crime, but

13   for many years, both before and after the Sentencing

14   Reform Act, the Attorney General through the Bureau of

15   Prisons has decided where the sentence will be served

16   and when it shall commence.

17   JUSTICE SCALIA: I'm not clear on what the

18   -- what the government's view of whatever you want to

19   call it, inherent judicial sentencing power is. You --

20   you -- before section 3584 was passed, there -- there

21   was the power on the part of the Federal courts to

22   decide whether sentences should run concurrently or

23   sequentially, right?

24   MR. JAY: Not with a State sentence, Your

25   Honor. Before section 3584(a) was passed, a Federal

1   district court had no authority to specify that its

2   Federal sentence should run concurrently with a State

3   sentence that the defendant was already serving.

4   JUSTICE SCALIA: How do you know?

5   MR. JAY: Well, that's --

6   JUSTICE SCALIA: I mean, it did not -- what

7   authority it did have did not come from a statute,

8   right?

9   MR. JAY: Well, if it had had such

10   authority, Justice Scalia, it would have overridden the

11   Attorney General's authority. That's why we know it

12   didn't have it. That's why --

13   JUSTICE SCALIA: Where is the Attorney

14   General's authority prescribed?

15   MR. JAY: The Attorney General's

16   authority --

17   JUSTICE SCALIA: His authority to say where

18   the sentence will be served?

19   MR. JAY: Precisely, Justice Scalia.

20   JUSTICE SCALIA: Oh, that -- that seems to

21   be quite --

22   MR. JAY: If you look up --

23   JUSTICE SCALIA: -- quite fanciful.

24   JUSTICE BREYER: -- really interesting,

25   because I did go back and look at the '79 Senate report

1   on the S.1, which was the whole reform, from beginning

2   to end, and my reading of that section suggests to me

3   that they thought past practice was exactly what they

4   wrote in this statute. Now in the -- at least that's

5   how I read it. Maybe I didn't read it carefully enough.

6   But I thought they were thinking that the Federal judge

7   does have the power to sentence concurrently or

8   consecutively with a term that a Federal court or a

9   State court has imposed in the past, but -- but you

10   can't do this monkey business that they're -- I agree

11   with you on that.

12   There was nothing about trying to make

13   something concurrent or consecutive with a -- a State

14   term that hasn't yet been imposed. You couldn't do it;

15   you can't do it; it just gets into a -- at least not

16   with a consecutive.

17   MR. JAY: Let me see if I can answer both

18   Justice Scalia and Justice Breyer. There are cases that

19   we cite at page 16 of our reply brief. Those same

20   cases, Justice Breyer, you may want to look at the

21   Senate report on -- on what actually became section

22   3584, page 126 -- sorry, page 127 and note 314, which

23   says that it changes the law. It recognized that the

24   law -- specifically citing a Ninth Circuit decision,

25   which we also cite in our brief, because the Attorney

 1   General has the power to designate any facility, Federal

 2   or State, and that's -- that is carried forward today in

 3   section 3621(b. Because the Attorney General has the

 4   authority to designate any such facility, a Federal

 5   court before the passage of section 3584(a) had no

 6   authority to order that the Federal sentence commence

 7   right away and that the defendant be allowed to serve it

 8   while also serving --

 9   JUSTICE GINSBURG: He could recommend it.

10   He could recommend it, could he not?

11   MR. JAY: Absolutely, Justice Ginsburg. He

12   could recommend it, just as he can today.

13   CHIEF JUSTICE ROBERTS: You said Federal or

14   State. Where does it say that in 3621?

15   MR. JAY: Section 3621(b), Your Honor. If

16   you look at subsection (b) --

17   CHIEF JUSTICE ROBERTS: Yes.

18   MR. JAY: -- the second sentence, "the

19   Bureau may designate any available penal or correctional

20   facility" -- skip forward a little bit -- "whether

21   maintained by the Federal Government or otherwise" --

22   JUSTICE KENNEDY: In other words, what the

23   statute does is it's phrased in terms of place, but it

24   really has consequences as to time. Einstein would have

25   loved it: You can't define space without time.

1   (Laughter.)

2   JUSTICE KENNEDY: But -- but -- I take it

3   that it can also be retroactive. If you have a prisoner

4   who has served -- has been sentenced in the Federal

5   system, then goes to the State and is serving in a State

6   facility, he then comes back to the BOP, the BOP can

7   retroactively say we designate the place of imprisonment

8   for the last 3 years as that State prison where you have

9   been serving and we credit you with time served; is that

10   the way it works?

11   MR. JAY: That is how it works.

12   JUSTICE SCALIA: Nunc pro tunc, right?

13   JUSTICE KENNEDY: That -- that's an amazing

14   interpretation.

15   JUSTICE SCALIA: You get that out of this --

16   this lean language here?

17   JUSTICE KENNEDY: I understand that's your

18   interpretation of the statute, but I -- I understand

19   that -- that's the way it's being done.

20   MR. JAY: That is the way it's being done,

21   Justice Kennedy. Indeed, every time the bureau

22   designates a Federal prison or a State prison, it's

23   after the person comes into Federal custody, except in

24   cases where the person voluntarily surrenders.

25   CHIEF JUSTICE ROBERTS: Or -- or what if

1   it's a situation where he goes into one of these prisons

2   that are run by a private entity, right, whether the

3   Federal Government or otherwise, right? And so maybe

4   the Federal Government -- I don't know how often it

5   might do it -- they -- you use facilities that are

6   privately run, right?

7   MR. JAY: Privately run, State facilities,

8   Federal facilities.

9   CHIEF JUSTICE ROBERTS: Okay. So why isn't

10   that what they meant when they said "whether maintained

11   by the Federal Government or otherwise"? I think if

12   they want -- wanted to say State or Federal, that's what

13   they would have said.   `

14   MR. JAY: Mr. Chief Justice, Federal inmates

15   since the passage of the first Federal crime in 1790

16   have served their time in State prisons. There were no

17   Federal penitentiaries for more than 100 years. The

18   attorney -- service of a Federal sentence in State

19   prison was the norm, even after the construction of --

20   of Federal penitentiaries.

21   JUSTICE ALITO: It seems to me that the

22   question of how long someone should spend in prison,

23   which is what's involved in determining whether --

24   deciding whether a sentence is going to be served

25   consecutively or concurrently, is very different from

1   determining where the sentence is going to be -- where a

2   sentence is going to be served.

3   Isn't this a very strange reading of -- of

4   3621, to say that that grants the BOP the authority to

5   make this concurrent/consecutive determination?

6   MR. JAY: I don't think so at all, Justice

7   Alito. Let me give two reasons why. The first is that

8   before section 3584 was enacted, this -- the predecessor

9   of this statute, which was section 4082, was the reason

10   that Federal courts recognized that they didn't have the

11   power to prescribe concurrent treatment of a Federal

12   sentence with a previously existing State sentence.

13   That's one point.   `

14   The second point is, as Mr. Hawkins

15   mentioned, the quantum of Federal punishment, the

16   punishment for the Federal offense, that's up to the

17   Federal district judge to prescribe; but where -- where

18   that time will be served, and whether the time has to

19   commence before, after or during the defendant's service

20   of another sentence, that's a where and when question.

21   And where and when questions have always been up to the

22   Attorney General.

23   JUSTICE KAGAN: Mr. Jay?

24   MR. JAY: Yes.

25   JUSTICE KAGAN: Can I -- can I take you back

1   to 3584? So 3584 talks about these two situations,

2   simultaneously imposed terms and undischarged terms, and

3   let's assume that all three sentences talk about only

4   those two situations. The premise of your argument is

5   that in talking about those two situations Congress

6   rejected judicial authority when it came to a third

7   situation. And I guess I want to find out from you why

8   that is. I mean, I want to stipulate, I guess, that

9   nobody had this third situation in mind. The third

10   situation is a very uncommon situation, and so just

11   assume with me that Congress simply just wasn't thinking

12   about this third situation. That's an assumption of the

13   question.   `

14   What should we do, then? Why would we treat

15   this as exclusive?

16   MR. JAY: Well, I will -- I will assume with

17   you, Justice Kagan, although you know that I disagree,

18   that the -- that this is conscious. But two points:

19   first, there was no inherent authority beforehand, so

20   Congress couldn't have been carrying forward existing

21   practice, because, as I've said, there was no inherent

22   authority for district courts to make this decision

23   before.

24   JUSTICE KAGAN: Well, let's just say

25   Congress just didn't know. It was not on Congress's

1   radar screen. Why would we treat this as exclusive as

2   to this third situation?

3   MR. JAY: You would do it this way because

4   -- because the limitations are so clear and because, as

5   Mr. Hawkins said, there is a universe with sort of three

6   possible relationships. Either the Federal term comes

7   before the State term, after the State term, or two

8   Federal sentences can come at the same time. So

9   Congress prescribed very carefully that if one of those

10   or if the second of those is met, then the terms may run

11   concurrently or consecutively. But by allowing the

12   third, the only other possibility --

13   JUSTICE KAGAN: Well, now you are back with

14   my assumption. You are suggesting that Congress must

15   have had this third situation in mind. And I'm saying

16   no; the third situation is peculiar, and Congress didn't

17   have it in mind. Then what?

18   MR. JAY: Well, its peculiarity, Justice

19   Hagan, doesn't take away from the fact that if you let

20   this situation in then the limitations have no meaning.

21   JUSTICE BREYER: You are talking

22   linguistically that I thought one Congress probably did

23   have it in mind. I agree with you about that. But

24   leave that out. How do you do it? You are a Federal

25   judge. The point of the Federal guideline is to create

1   a sentence with qualifications that reflects the real

2   conduct in the world that the defendant engaged in. All

3   right, so we work that out. That's now 3 years.

4   Now, our problem is that the State judge may

5   eat up some of that 3 years or may make the sentence

6   concurrent when it should be consecutive, because the

7   conduct's different. So I the Federal judge say: You

8   are convicted of a drug crime; you get 3 years. I know

9   there is a question here about whether there is a

10   separate gun crime. That's State. Now, I want these 3

11   years to run consecutive with the State conviction for a

12   separate behavior. Okay? Now, that's what I want.

13   Now, are it's in the past, the State

14   sentence, I can do it. But where it hasn't been

15   happening yet, how do I do it? I say I want it

16   consecutive, but the State court judge who later will

17   have control of the case can say: I put my extra 2

18   years and make it concurrent with the State sentence."

19   You see? It's a problem. It's a practical problem.

20   Now, maybe I'm wrong in what I've just said, which is

21   why I said it, because I'm prepared to have you tell me

22   I'm wrong, there is no practical problem. But I want to

23   hear it.

24   MR. JAY: It's not a practical problem,

25   Justice Breyer, for a couple of reasons.

1   JUSTICE BREYER: All right. Good. That's

2   why I asked.

3   MR. JAY: Number one -- number one, the

4   judge doesn't know -- you asked us to assume there has

5   been a conviction in the State, maybe just not --

6   JUSTICE BREYER: No --

7   MR. JAY: Maybe just not --

8   JUSTICE BREYER: There has not been a

9   conviction.

10   MR. JAY: That just highlights my point.

11   There hasn't been a conviction yet, let alone a

12   sentence. There may never be a conviction, and -- but

13   if the judge wants to guard against that eventuality,

14   the judge can make a recommendation. And there are two

15   salutary things about making a recommendation --

16   JUSTICE BREYER: How does the judge stop the

17   State court judge later from making his conviction for a

18   separate form of behavior run concurrently with the

19   Federal sentence? How does he stop that? What power

20   does he have over State court.

21   MR. JAY: I don't think I or either of my

22   friends who are going to argue today are suggesting that

23   the Federal judge has power to order the State court not

24   to do something.

25   JUSTICE BREYER: Correct. Then how can he

1   stop it?

2   MR. JAY: Well, the way that sovereigns work

3   out who gets to punish, if they both want to punish --

4   JUSTICE BREYER: You may have missed my

5   point. My point is because he can't stop it is why

6   you're right in this case.

7   MR. JAY: I am delighted to hear that you

8   think we are right, Justice Breyer.

9   (Laughter.)

10   MR. JAY: But I want to -- I do want to give

11   you an answer to your question about why this is not a

12   practical problem. The Federal judge can give -- can

13   make a recommendation that says: If he's convicted and

14   if he's sentenced to a particular term in the State

15   court, I recommend that the Bureau of Prisons not let

16   him serve them -- concurrently.

17   CHIEF JUSTICE ROBERTS: So that --so that

18   20 years later after the defendant has served his

19   mandatory minimum sentence, your friend in the Bureau of

20   Prisons regional office is supposed to go look back and

21   see what the judge said 20 years ago?

22   MR. JAY: Judges make recommendations all

23   the time, Mr. Chief Justice. They --

24   CHIEF JUSTICE ROBERTS: I don't think that

25   is responsive to the point I just made, that they make

1   recommendations all the time. I'm talking about the

2   effectiveness of the recommendation 20 years later.

3   MR. JAY: As the Court is aware, the

4   Administrative Office's standard form for the judgment

5   in a criminal case allows the judge to make

6   recommendations to the Bureau of Prisons. So this will

7   be in the judgment, the very judgment that the Bureau of

8   Prisons will be looking at, whether it's a week later or

9   20 years later. And if the --

10   JUSTICE GINSBURG: Mr. Jay, what does the

11   "or" mean. Maybe the judge -- it was 20 years ago and

12   maybe the judge said nothing. It's -- what was the

13   intent of the sentencing court or the goals of the

14   criminal justice system.

15   MR. JAY: Your Honor is reading from the

16   Bureau of Prisons policy statement.

17   JUSTICE GINSBURG: Uh-huh.

18   MR. JAY: If you go on in that policy

19   statement, it alludes to other considerations that the

20   Bureau looks at. And what that maps onto is the factors

21   in section 3621(b). And I can represent to the Court

22   that when -- when the -- when an inmate asks for

23   concurrent treatment in this fashion, the Bureau's

24   central facility for designation and sentence

25   computation goes through those factors in an

1   individualized way and makes -- makes a decision. That

2   then is reviewable.

3   JUSTICE SOTOMAYOR: Mr. Jay --

4   JUSTICE GINSBURG: Do they take -- do they

5   take account of the -- the defendant's behavior in the

6   State facility? Is that a factor?

7   MR. JAY: In Federal or State custody,

8   Justice Ginsburg, it may be a factor, yes.

9   JUSTICE GINSBURG: Which is something that

10   the judge couldn't know.

11   MR. JAY: That's certainly correct. And on

12   the flip side is if the defendant has behaved in an

13   exemplary way, then either the judge ·-- the judge may

14   indeed change his recommendation. We have cited a case

15   in our brief where a judge --

16   JUSTICE SCALIA: I thought we tried to get

17   rid of all of that when we abolished the parole system.

18   I thought we tried to take away from the bureaucrats the

19   decision to let somebody out earlier because he's been a

20   good boy and hold him longer because he hasn't.

21   MR. JAY: Mr. Setser has been sentenced to

22   151 months for his Federal crime. Nothing the Attorney

23   General does is going to shorten that in a way not

24   authorized by statute. It doesn't make the sentence an

25   indeterminant one. It's about where he is going to

1   serve it.

2   JUSTICE SOTOMAYOR: Mr. Jay, there is some

3   force to your, to Petitioner's argument that federalism

4   should be respected, that Federal courts -- the State

5   judges and their individual wishes should be respected

6   and followed by BOP actually. The system you're

7   proposing actually takes away from both Federal judges

8   control over the sentencing decision.

9   If Federal judges recommend a consecutive

10   sentence, then the State judge can take that into

11   account in setting how much time they think is warranted

12   for their crime in addition or different from, and the

13   judge if he wants it to run concurrently the way

14   Justice Breyer said, he could just give a zero. He

15   knows what the Federal judge wants.

16   CHIEF JUSTICE ROBERTS: You may answer

17   briefly.

18   JUSTICE SOTOMAYOR: The bottom line --

19   MR. JAY: Thank you, Mr. Chief Justice.

20   The --the State judge can still know what

21   the Federal judge recommends. If it's not -- it just

22   won't be binding under our view of the statute. And in

23   any event, having the second decisionmaker make the

24   decision armed with all the information is still

25   preferable to having a premature determination locked in

1   in a judgment.

2   CHIEF JUSTICE ROBERTS: Thank you, counsel.

3   MR. JAY: Thank you, Mr. Chief Justice.

4   CHIEF JUSTICE ROBERTS: Mr. Young.

5   ORAL ARGUMENT OF EVAN A. YOUNG,

6   ON BEHALF OF AMICUS CURIAE,

7   IN SUPPORT OF THE JUDGMENT BELOW

8   MR. YOUNG: Mr. Chief Justice and may it

9   please the Court:

10   As this Court stated nearly a century ago in

11   Ex parte United States, under our constitutional system

12   the right to impose the punishment provided by law is

13   judicial.   `

14   Congress does not transfer such core

15   authority from one branch to another without clearly and

16   expressly saying so. Neither section 3584 nor any other

17   provision of the Sentencing Reform Act even remotely

18   approaches the clarity that Congress would use if it

19   intended to restrict judicial sentencing in cases like

20   Setser's.

21   JUSTICE SCALIA: The government says that

22   the Federal courts never had that power anyway, so that

23   nothing is being restricted. And they contest the cases

24   that you have cited as demonstrating the existence of

25   that power in the situation involved here to -- to

1   determine whether a future -- a sentence to be imposed

2   in the future by State courts will be concurrent or

3   consecutive with the Federal one.

4   MR. YOUNG: Against -- that is wrong,

5   because against a number of cases that we cite -- and I

6   would commend them to the Court -- in which Federal

7   judges previous to the Sentencing Reform Act

8   anticipatorily sentenced. The government and Mr. Setser

9   have provided zero cases.

10   JUSTICE BREYER: But nobody found that out

11   in 1980, in 1980 or '79. If you look through the Senate

12   Report on that, they don't refer to any of those cases.

13   They write it as if it was just as Justice Scalia and

14   the government said.

15   And honestly, my question really is the same

16   one -- maybe I didn't put it clearly, but I think you

17   understood it -- that the reason they want the Federal

18   judge to be able to shape his sentence in light of other

19   sentences that either the Federal courts or the State

20   courts have given in the past is because you can do it

21   so that a single behavior gets a single sentence and a

22   different behavior is going to be sentenced

23   consecutively, presumptively.

24   But you just can't do that where the State

25   court hasn't yet acted, because -- at least you can't do

1   it in the consecutive case, because the State court

2   judge sees what you did and he may decide: I don't want

3   it to be conservative. So here I am; I'm writing my

4   sentence to be served concurrently with the Federal

5   court sentence.

6   Now, you can have every agency you want in

7   the Federal Government. But there's no way to get

8   around that. You can't force that State judge to do

9   something different and you can't muck around with your

10   Federal sentence in a way that will make it consecutive

11   to a State court sentence that says it's going to run

12   concurrent. So there is a practical problem and that's

13   why it's left out. It's quite -- I mean, when I

14   finished reading it I thought this is very logical. Can

15   you tell me what the answer to that is?

16   MR. YOUNG: I think the answer is that it

17   turns much more on the order of imprisonment than the

18   order of sentencing, because the Federal court in Mr.

19   Setser's case, for instance, is imposing no obligation

20   whatsoever on the State. The State --

21   JUSTICE BREYER: I don't deny that there are

22   many instances where you could get it to work,

23   particularly where you are going concurrent. I do deny

24   that there is -- it's all smooth sailing. There are a

25   lot of cases you can't get it to work. I don't want to

1   repeat myself again. I've given you the example, I gave

2   him the example, and I want to know how you would

3   overcome that could be quite common situation where the

4   State judge hasn't done it yet, so there's no way to

5   require the Federal court sentence to be served

6   consecutively, if the State judge decides it shouldn't

7   be.

8   MR. YOUNG: Well, let's take this very case,

9   for instance. Mr. Setser was sentenced in Federal court

10   first and the Federal court said: I see that there is

11   coming a State probation revocation. I want this

12   Federal sentence, which will be served last, to have no

13   credit for whatever happens in State·court.

14   JUSTICE BREYER: He can do that.

15   MR. YOUNG: And that's all he did do.

16   JUSTICE BREYER: Oh, I know. I don't deny

17   there can be some. I say there is a concern that if he

18   were to say in a different case, I want the gun thing

19   which is going to State court to be consecutive, that

20   you can't control that. Because the State court judge

21   could say: I want my gun sentence, State, to run

22   concurrently with Federal.

23   MR. YOUNG: What the State judge could not

24   do is to say: I want this State sentence, which is

25   going to be served first, to run concurrent to the

1   later-served Federal sentence because that would require

2   the Federal sovereign to let someone go.

3   JUSTICE BREYER: Oh, well, now we are

4   getting awfully complicated.

5   MR. YOUNG: Actually --

6   JUSTICE SOTOMAYOR: Mr. Young -- it becomes

7   easier than that. The State court can't force the

8   Federal Bureau of Prisons to take the prisoner back,

9   correct?

10   MR. YOUNG: Can't force the Federal Bureau

11   of Prisons to do anything.

12   JUSTICE SOTOMAYOR: Exactly. And so all it

13   can do is sentence the defendant to whatever time it's

14   going to sentence the defendant. The defendant serves

15   that time. Then the Federal sovereign takes over and

16   does whatever the Federal judge said.

17   MR. YOUNG: Precisely.

18   JUSTICE SOTOMAYOR: Runs it consecutively or

19   concurrently. Whatever the Federal judge said controls

20   in every situation.

21   MR. YOUNG: The Bureau of Prisons can

22   effectuate that order very easily once that's happened.

23   JUSTICE KAGAN: Mr. Young, the government

24   says that there are three situations in which this

25   consecutive-concurrent problem comes up. This statute

1   deals with two of them. And the government wants to --

2   argues that in dealing with two of them it impliedly

3   stated a rule on the third. What's the best argument --

4   what's your best argument against that?

5   MR. YOUNG: I think the best argument is

6   that the statute plainly does not withdraw any

7   authority. It doesn't describe it at all. What the

8   statute does -- in --

9   JUSTICE KAGAN: I think that that's not

10   right. It seems to me that the first sentence of this

11   statute grants authority to the courts in these two

12   situations. And the second and third say what happens

13   when that authority isn't exercised.· The question I'm

14   struggling with -- and it's the same question I put to

15   Mr. Jay -- is why we should think that the grant of

16   authority over situation A and situation B is a denial

17   of authority over situation C. So what's your best

18   argument?

19   MR. YOUNG: Well, my best argument, assuming

20   the premise that it's a grant, which I think is not the

21   best way to read it, but if it's a grant of authority,

22   still the correct answer is it says nothing at all about

23   the anticipatory context. And Congress must speak

24   clearly if it will withdraw power from the courts.

25   JUSTICE GINSBURG: Well, it does to this

1   extent. If the two -- it's the second sentence that

2   hasn't yet been imposed, but there is an indictment in

3   another Federal court. If there's two consecutive

4   prosecutions, the first judge can't say, I want my

5   sentence to run consecutive to the one that may or may

6   not be imposed by another Federal judge. That would not

7   be possible, right?

8   MR. YOUNG: I think it would not be

9   possible.

10   JUSTICE GINSBURG: So why should -- if the

11   order is one way for successive Federal prosecutions,

12   why should it be different when the second prosecution,

13   instead of being Federal, is State? ·

14   MR. YOUNG: For several reasons, one of

15   which is -- I think it ties into Justice Breyer's

16   question. If the Federal judge sentences first and

17   imprisons first, it could not impose a consecutive or

18   concurrent term as to the later-served State sentence

19   either. The first imposed Federal sentence will

20   presumably be served first in the same Bureau of

21   Prisons. And so there is nothing for it yet to be

22   consecutive or concurrent to.

23   A second answer is that all Federal

24   sentences are served under the jailer of the same

25   sovereign, the Federal, whereas in the anticipatory

1   context we have two different systems. And so the first

2   sentencing federal judge is the only judge that can

3   compel the jailer of the Federal sovereign to either

4   credit or not to credit. Whereas in the Federal --

5   Federal system, under the statute, the second judge is

6   explicitly given the power to alter the default rule.

7   So in all Federal cases either a default rule or a judge

8   will determine whether or not a credit should be given

9   to the defendant.

10   JUSTICE GINSBURG: But it would be the

11   second judge.

12   MR. YOUNG: The second Federal judge can do

13   it but a second State judge cannot, because this statute

14   can neither empower the State judge --

15   JUSTICE GINSBURG: The State judge can

16   decide what's going to happen with the second sentence.

17   MR. YOUNG: If the second sentence is served

18   second. But as in this case and many others, the second

19   sentence is served first. And consequently the second

20   sentencing judge, the State judge in Mr. Setser's case,

21   has no power to determine whether or not that sentence,

22   which will be served first, will be consecutive or

23   concurrent. Now, I know there is a lot of firsts and

24   seconds going on here, but the point is --

25   JUSTICE GINSBURG: But what do you do with

1   the -- the argument about the judge who anticipates a

2   second sentence may be wrong. He doesn't know what that

3   will be. And when I asked, how does the bureau make

4   these judgments, does it take into account the conduct

5   of the prisoner in the State facility? That's something

6   that the judge who sentences first can't possibly know.

7   MR. YOUNG: It's true. But the same

8   prisoner -- if the State sentence had happened 10

9   minutes before the Federal sentence, the Federal judge

10   would have plenary authority to impose a consecutive

11   sentence, even though it would be served last. And all

12   of that conduct that will happen in the State system

13   would be irrelevant. The sentence happens at the time

14   of sentencing.

15   Now, there is a statutory provision that

16   does describe exactly how the Bureau of Prisons should

17   interact with the courts in the context of a sentence

18   that needs to be changed and that's section 3582(c).

19   And in that statute the judge will remain the decider,

20   because the Bureau of Prisons goes as a petitioner and

21   says to the court: There are compelling and

22   extraordinary reasons to modify this sentence.

23   And then the court, always in the position

24   of the decider and using the section 3553(a) factors,

25   will decide whether or not the Bureau of Prisons'

1   petition should be granted. But never in any statute is

2   the Bureau of Prisons given the authority to use the

3   sentencing factors under section 3553.

4   And in fact the sentencing factors that the

5   government contends would allow it to make a sentencing

6   determination under 3621, page 2a of the government's

7   merits brief, starts off with the very preliminary

8   requirement, and I will read from the second sentence of

9   3621(b)b: "The bureau may designate any available penal

10   or correctional facility that meets minimum standards of

11   health and habitability established by the bureau."

12   Which means that if this is the power that the Bureau of

13   Prisons has to make a sentence concurrent, a State

14   prisoner in a true hellhole would not be able to get a

15   concurrent sentence. The person most in need of that

16   judicial mercy would be precluded by statute if we

17   subject this statute to anything like the textual rigor

18   that the government wants to subject 3584 to.

19   Plainly what 3621(b) does is articulate a

20   set of principles that allows the Bureau of Prisons to

21   decide to which prisons defendants should go, not how

22   long they must stay there. That is an element of

23   punishment, which is quintessential judicial. This

24   Court said in Ex parte United States -- it's been quoted

25   and cited by courts across this country for 100 years,

1   and in fact in that case it was said to be so

2   historically established that it hardly merited comment,

3   and now --

4   JUSTICE BREYER: Well, I'd be a little

5   worried in this case at deciding whether section, what

6   is that section, the place of imprisonment, section

7   3621(b) whether that does or does not give the power to

8   the Bureau of Prisons, the power that they've assumed

9   for many, many years. Do we have to decide that

10   question here? I didn't realize I was deciding that. I

11   thought I was just deciding whether -- whether the

12   judge, the sentencing judge, has the power to impose say

13   a consecutive sentence, say my sentence will run

14   consecutively to a State court sentence that has not yet

15   been imposed. I thought that was all I had to decide.

16   MR. YOUNG: That is all you have to decide.

17   But in so deciding you are confronting the argument that

18   the government makes which is: No, no; Congress has

19   exclusively vested this sentencing function in us.

20   JUSTICE BREYER: I don't think you have to.

21   I mean, maybe we do have to get to that.

22   JUSTICE SCALIA: Well, somebody has to make

23   that call.

24   MR. YOUNG: Should it be the judge or the

25   jailer?

1   JUSTICE SCALIA: If you say -- it's either

2   the judge or the jailer. There's nobody who else is

3   going to make it.

4   MR. YOUNG: That's precisely the point. And

5   the argument --

6   JUSTICE SCALIA: So if you say the judge

7   can't, it's going to be the Bureau of Prisons.

8   MR. YOUNG: Precisely. And to say that

9   Congress has never given it to the Bureau of Prisons

10 necessarily means that it is the judge.

11   JUSTICE BREYER: Well, let me ask you this

12 then: Is it -- is it -- if we want the judge to be able

13 to say this particular prisoner will·serve his Federal

14 sentence after the State gun sentence is served or

15 alternatively with the State gun sentence, the 3621 says

16 that -- that the judge can, if that sentence, State

17 sentence has not yet been imposed, we don't know what it

18 is, we don't know if it will be imposed, we don't know

19 what they are going to say, we don't know whether they

20 are going to sentence him to be -- count his time, time

21 served in the Federal judge. I mean, I don't know what

22 they are going to say in Federal prison.

23   But he can write down what he wants as far

24 as any statement by the court that imposed the sentence,

25 a statement concerning the purposes for which the

1   sentence of imprisonment has been imposed. He would

2   say: I'm trying to get a single behavior punished once

3   for 4 years and then that separate behavior I would like

4   punished by 2 years more. Okay?

5   So you write it down and the Bureau of

6   Prisons follows it. And if they don't follow it, they

7   could get reversed by a district court, abuse of

8   discretion. Now, will that solve the problem?

9   MR. YOUNG: It doesn't, Your Honor, because

10   what that factor allows the Bureau of Prisons to do is

11   to decide, based upon the judgment here, is this someone

12   who needs to be in the super-max or is it someone that

13   can be in a much more minimum security type prison?

14   None of this has anything to do with the

15   determination of how long someone should spend in

16   prison, 10 years, 20 years. The government says: It's

17   all the same; you will serve your Federal prison term.

18   It doesn't seem that from the perspective of an

19   identically situated person who will spend 20 years

20   rather than 10 years of his life in prison.

21   JUSTICE SCALIA: Am -- am I correct, Mr.

22   Young, that if -- if the Federal sentencing judge is

23   erroneous in his prediction of what the State court

24   later sentencing will do, that his order, based upon

25   that erroneous prediction, can be altered upon appeal by

1   the Bureau of Prisons?

2   MR. YOUNG: That's correct. And the only

3   situation in which a prisoner would be harmed is if the

4   Federal judge says, I want it to be consecutive, and

5   then the Bureau of Prisons comes in later, 20 years

6   later after he is done with the State term, let's say,

7   and says: Boy, we would have made this concurrent, and

8   here are all reasons why. Congress has provided a means

9   to do that, section 3582(c). Go to the Federal court as

10   the petitioner, not the decider. Congress did not

11   unilaterally give the Bureau of Prisons the power it is

12   now claiming. And so, for that reason --

13   CHIEF JUSTICE ROBERTS: I am interested in

14   pursuing the point Justice Breyer raised. I am troubled

15   by the idea that someone in the Bureau of Prisons makes

16   this determination, but I -- I wonder how that -- how

17   that helps you.

18   You said it's either the jailer or the

19   judge, and therefore, you do have to decide it. But

20   maybe it's either the first judge or the second judge.

21   MR. YOUNG: In -- in --

22   CHIEF JUSTICE ROBERTS: Why isn't -- doesn't

23   it make sense to say that the Federal court doesn't --

24   whoever is second can always tailor their sentence to

25   what they want. Whoever is first just has to give the

1   sentence that he or she thinks is appropriate.

2   MR. YOUNG: Because in the dual sovereignty

3   context that second sentencing judge cannot compel the

4   Federal sovereign to either reduce --

5   CHIEF JUSTICE ROBERTS: Doesn't compel --

6   no, doesn't compel the Federal sovereign. He would say:

7   Look, I want to give 10 years.

8   MR. YOUNG: Right.

9   CHIEF JUSTICE ROBERTS: I see you have

10   already got, you know, a -- a 15-year sentence under the

11   Federal, but I don't want it to be 25 years; so I'm

12   going to, in fact, just give you a 5-year sentence. Do

13   understand what I'm making?   `

14   MR. YOUNG: Yes.

15   CHIEF JUSTICE ROBERTS: Whoever the second

16   judge is can figure out exactly how long he thinks the

17   sentence should run, and give the sentence accordingly.

18   MR. YOUNG: That cannot be the case if it's

19   a State court and the State court does not know, with

20   respect to a later-served Federal sentence, whether or

21   not the time will be credited. So in other words, in

22   your example --

23   JUSTICE KENNEDY: Well, but I suppose in the

24   Chief's example a super cautious State court judge would

25   say: I see you've got a 15-year sentence here, I don't

1   know if it's going to be concurrent or consecutive; so I

2   will sentence you to nothing at all. I mean, I

3   suppose -- which shows that there -- if -- if you follow

4   your rule, you may be infringing on the Federal balance,

5   but then you would say the BOP can do the same thing.

6   MR. YOUNG: In the case in which the -- the

7   State judge says, I want it to be zero, then we know

8   that the State relinquishes its custody. And whatever

9   happens later in Federal prison, a pardon, let's say, or

10   a reversal, that's -- that's gone and done. The State

11   no longer has claim on him. They have sentenced him to

12   zero.

13   If the State judge knows; however, that the

14   Federal court has sentenced someone to 5 years and it

15   will be conservative because it's served last to

16   whatever the State judge imposes, the State judge now is

17   in a position, and only in that situation, is in a

18   position to say, okay, if I give you 2 years, you will

19   spend 7, because I know that the Federal sentence will

20   be consecutive.

21   On the other hand, if the curtain is only

22   pulled up by the Bureau of Prisons at the end and the

23   State judge says I want you to have 10 years, I will

24   sentence you to 5, and the Bureau of Prisons pulls up

25   the curtain, it's concurrent. Then only 5 years has

1   been sentenced.

2   JUSTICE KENNEDY: Well, you're saying that

3   your position is really more consistent with the Federal

4   balance because it allows the State to know what it's

5   deal with?

6   MR. YOUNG: Precisely. The only way to

7   really respect the second sentencing State judge is to

8   provide clarity, rather than to force that State judge

9   to guess the sentence in the dark about what will

10   actually happen to this defendant later on when he

11   eventually, after State confinement, is transported to

12   the Federal prisons.

13   This case is only about that situation in

14   which the first sentence is imposed by the Federal

15   court, but before the Federal sentence is enforced, all

16   of the State -- that's why the Federal book ends, I

17   describe it. We start with the Federal sentence, and we

18   end with the imposition, the service of the Federal

19   service.

20   And in between those two things, the State

21   sentencing and imprisonment occurs. And, so, the State

22   judge cannot make his sentence be concurrent or

23   consecutive to the Federal sentence, because the Federal

24   sentence hasn't been imposed yet. Consequently, hasn't

25   been served yet. Consequently, providing that State

1   judge with knowledge about what will happen is the only

2   way to give that State judge the respect the State judge

3   needs and requires to be able to implement State goals

4   in a meaningful way. Otherwise, it's a guess.

5   As you heard, the Bureau of Prisons does not

6   follow, as a matter of course, a second sentencing State

7   judge's preference that it be concurrent or consecutive.

8   That is something that the Bureau of Prisons, as

9   responsive to the Federal courts, Federal sovereign,

10   will decide based upon what happens in the Federal

11   court.

12   JUSTICE ALITO: This is perhaps something

13   that I should have asked the Solicitor General, but do

14   you have any idea how often this situation comes up?

15   MR. YOUNG: I don't have specific numbers.

16   It's difficult to find them, but I think it's

17   increasing. And the reason for that is the explosion of

18   Federal criminal law. There is still far more State and

19   local law enforcement officers in this country. And the

20   doctrine why these -- why these sentences can be imposed

21   first and served last is because of the primary custody

22   rule. Because a local or State law enforcement officer

23   will most likely arrest someone whose act will violate

24   the laws of both sovereigns, that person will be in

25   State custody.

1   We now have so many more offenses under the

2   Federal Criminal Code than we did even back when

3   Congress passed the Sentencing Reform Act, which goes,

4   perhaps, to Justice Kagan's point, Congress may not

5   really have been thinking about this at all.

6   JUSTICE SOTOMAYOR: So is there evidence one

7   way or the other on that question, whether this

8   situation was in any meaningful sense before the

9   Congress?

10   MR. YOUNG: Everything is silent. I think

11   it was not. As to the question about whether courts

12   could impose concurrent consecutive sentences, what the

13   report says, footnotes 310, 314, 318; pages 126, 127,

14   and 129 of the sentencing report, there were some courts

15   that thought that a prior statute stopped them from

16   imposing only concurrent sentences in the dual

17   sovereignty context.

18   Congress made very clear -- in fact, it

19   cited by name United States v. Segal, one of the cases

20   the government cites for this proposition as being

21   incorrect. We want to make it clear Congress says in a

22   report, you can impose concurrent sentences, but all

23   along conservative sentences were imposed

24   anticipatorily.

25   And, so, this is sort of like, you know, the

1   rule that if someone cannot have M&M's at all, being

2   held to mean that you cannot have candy after dinner, if

3   you had Snickers after dinner every night. Once you

4   remove the obstacle to having M&M's, then presumably you

5   can have them after dinner as well. There was no rule

6   that you couldn't have any candy after dinner.

7   There was no rule that Federal courts could

8   not sentence anticipatorily. There was simply a

9   statutory bar that some courts thought stopped them from

10   imposing concurrent sentences in the dual sovereignty

11   context.

12   JUSTICE ALITO: In order for you to prevail,

13   I think we -- is it correct, we would have to determine

14   that there was this authority inherent in the judiciary

15   prior to the enactment of this statute?

16   MR. YOUNG: I don't think that that is

17   necessarily true. I think it makes it much easier. And

18   there can be no question that concurrent and consecutive

19   sentencing is inherently and quintessentially judicial.

20   This court in Oregon v. Ice only two terms ago regarded

21   it that way.

22   JUSTICE ALITO: Yes, with respect to Federal

23   sentences, certainly that is true. But with respect to

24   Federal and State sentences it may be, as you suggested

25   it, this just did not come up very often until the

1   enactment probably of the Federal drug laws and -- and a

2   few other statutes that created offenses where you

3   have -- where the same conduct would constitute a

4   violation of both Federal and State law, and so you have

5   this situation coming up with greater frequency.

6   MR. YOUNG: That's true with greater

7   frequency. It did happen. And the courts recognize

8   this, and without any concern, sentence anticipatorily.

9   JUSTICE KAGAN: But -- but if one had -- you

10   know, what I take as the view of Justice Alito's

11   question is that there was no -- no practice supporting

12   courts sentencing in this way. It -- it just wasn't

13   done. Mostly, it wasn't on anybody's radar screen that

14   this was a significant issue. What would we do then, if

15   we thought Congress didn't speak to it, but we also

16   didn't see a past practice inconsistent with what the

17   government is suggesting?

18   MR. YOUNG: In that case, if the choice is

19   between the judge and the jailer, I think the choice is

20   clear. If Congress did not specifically say that

21   something as quintessentially judicial as deciding how

22   long someone would spend in prison must be decided by

23   the executive branch. Questionable whether it could.

24   But unless it explicitly said "this is how we want it to

25   happen," there could be no doubt that imposing extra

1 punishment or withdrawing punishment is so judicial in

2 nature that even if Congress didn't think about it or

3 specifically address the problem, the tie certainly has

4 to go --

5   JUSTICE BREYER: No, it isn't a tie. I

6 mean, there is one thing on each side. On your side is

7 the fact that the sentencing judge, Federal, is trying

8 to figure out his own sentence and he does -- either he

9 does want or he doesn't want that particular individual

10 to serve additional time, should a State court judge

11 later decide on some related or unrelated matter, all

12 right?

13   And if that were all that was at issue, and

14 the choice is between his saying just doing it, writing

15 it in the sentence, or he's writing down his reasons

16 what he'd like to have happen in letting the Bureau

17 implement that as best they can under the section we are

18 talking about. That's on the one side. And that says

19 let the judge do it, don't give the implementation.

20   On the other side is to let the judge do it

21 risks complex interference with the second to sentence,

22 who is the State court judge. It may be you're right,

23 that there's some way of working it out, but it sounds

24 complicated to me, particularly in -- in the consecutive

25 case.

1   So we have federalism principles on one

2   hand, versus the judge, versus the bureaucracy on the

3   other. And so it isn't so easy. That's -- that's why I

4   think this is not such an easy case.

5   MR. YOUNG: Well, let me address what the

6   anticipatory sentencing, the Federal judge, how he could

7   possibly interfere with the State. I don't think that

8   he can if the State is sentencing second and imprisoning

9   first.

10   JUSTICE BREYER: No, no. It's the State

11   court judge that wants to sentence a person to an

12   unrelated offense --

13   MR. YOUNG: Right.   `

14   JUSTICE BREYER: -- but he wants -- he

15   decides he wants it to run consecutive -- concurrently

16   with the Federal -- ongoing Federal sentence. There is

17   no way to stop it.

18   MR. YOUNG: Well, the question is -- that's

19   the key point. If it's an ongoing Federal sentence, I

20   certainly agree. But the point here is --

21   JUSTICE BREYER: Well --

22   MR. YOUNG: -- his Federal sentence hasn't

23   begun. Setser doesn't begin --

24   JUSTICE BREYER: All right. Then you -- but

25   you can't break this thing down. Either they have the

1 power in the Federal district court under this

2 particular provision, with all its presumptions, to run

3 this mechanism, the one that's in the statute, in

4 respect to State court sentences that have not yet been

5 imposed or they do not have that power. We can't break

6 it down and say sometimes you have it, and sometimes you

7 don't.

8   MR. YOUNG: If the State court sentence has

9 not been imposed and will run second, a Federal court

10 can say consecutive or concurrent, but it wouldn't have

11 any meaning. Just as the State court, if it had tried

12 to bar the Federal Bureau of Prisons from keeping

13 someone would have no meaning. There's nothing for it

14 to be consecutive or concurrent to, if it's the first

15 sentence being served.

16   So in -- in that regard, I think the key

17 point is, a Federal court cannot say, I'm the first

18 judge to sentence and my sentence will immediately

19 begin. I want it to be consecutive to another State --

20 future State sentence. It wouldn't mean anything,

21 because the State would get that prisoner after he

22 satisfied his Federal term, and the State can do what it

23 wants. Let him go, keep him longer. That's the dual

24 sovereignty principle.

25   CHIEF JUSTICE ROBERTS: He can't -- he

1   can't -- if, for example, they are dealing with a

2   mandatory minimum. If the State court judge has to

3   sentence the person to 10 years, then your explanation

4   falls apart.

5   MR. YOUNG: If State law has a particular

6   requirement as Federal law in some cases -- 924(c)

7   does -- then that's the way dual sovereignty works as

8   well. But there is never a situation in which a State

9   judge is worse off by having the knowledge of what the

10   Federal court will sentence -- has sentenced and how

11   that sentence will be imposed.

12   Again, if there is a problem with it, the

13   Bureau of Prisons has a way to solve·it, and it's

14   through section 3582(c). It's not through a unilateral

15   determination, 20 years later perhaps, seeking the

16   advice of a judge. Maybe the advice of the judge is

17   provided at the time of sentencing. And if it can do

18   that, there's no reason why it couldn't be an order that

19   can be enforced rather than a piece of advice that is

20   given at the time of sentencing.

21   Judges decide how much punishment someone

22   should receive. In Federal court, Federal judges decide

23   how long someone should spend in the Federal Bureau of

24   Prisons. State courts can't do it, but they can adjust

25   sentences within the strictures of State law to account

1   for what they know is coming if Federal courts are able

2   to provide that advice.

3   If they cannot decide that issue and advise

4   the State court judge of what will happen, then there

5   are situations that will occur when the Bureau of

6   Prisons administers these sentences -- and there is no

7   question about that either. But the point is, there is

8   never a situation in which a judge, able and willing --

9   able to follow the section 3553(a) factors and willing

10   to impose that sentence, is doing something that will be

11   worse for the defendant or worse for the States than if

12   he does not do it.

13   You contrast the two situations that two

14   equally situated people would be in. On the one hand,

15   sentencing in open court by an Article III judge subject

16   to the 3553(a) factors with direct review in the courts

17   for reasonableness. On the other hand, sentencing by an

18   administrator without any of those salutary procedural

19   protections, without direct review in the courts, and

20   based on factors that determine to which prison someone

21   should go, not how long they must stay there for

22   purposes of punishment.

23   And for that reason alone, if for none

24   other, the Court should affirm the judgment because it

25   allows district judges, subject to their wise exercise

1   and sound exercise of discretion, to make these

2   sentences to clarify things upfront for everyone: the

3   defendant, the State courts and the Bureau of Prisons.

4   20 years, this country has had half of the

5   circuits following this practice, and there is not one

6   case cited on the other side showing that any

7   mal-administration of justice has resulted, any lack of

8   clarity, any problems with respect to how these

9   sentences are enforced.

10   And that's because it does the opposite.

11   Allowing judges who are able, in cases like Setser's, no

12   matter how much time the State gives for probation

13   revocation, no Federal credit should·be given to it. He

14   knows enough. He knows everything he needs to know to

15   make that sentence. He made it. It's effectuated by

16   the Bureau of Prisons. The government has not said once

17   that it cannot enforce that sentence.

18   And to the extent that Setser wishes to

19   challenge how the Bureau of Prisons credits the State

20   order, the mechanism to do that is to exhaust his

21   administration -- administrative remedies in the BOP,

22   and then seek judicial review to determine whether that

23   calculation was done rationally and fairly.

24   This appeal is not the place for that. This

25   appeal is to determine whether district courts never

1   have such authority.

2   I thank the Court.

3   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4   Mr. Hawkins, you have 2 minutes remaining.

5   REBUTTAL ARGUMENT OF JASON D. HAWKINS

6   ON BEHALF OF THE PETITIONER

7   MR. HAWKINS: Thank you.

8   Justice Breyer, if I can go back to your

9   hypothetical, I think that the way that the Federal

10   judge can get this accomplished is simply by waiting.

11   After -- after the conviction, Your Honor,

12   they can send the State prisoner back down to State

13   court, allow for that State sentence·to be imposed, and

14   then he can come back into Federal custody. And in that

15   situation, that is when the Court has the authority to

16   issue this binding order. That is the -- because it has

17   all of the information.

18   And -- and I would also --

19   JUSTICE SOTOMAYOR: That's preferable, to

20   clog the judicial system with untold number of Federal

21   convictions that have not been reduced to judgment?

22   That's preferable to giving judges, or recognizing their

23   power to state their views up front?

24   MR. HAWKINS: Your Honor, the judge can

25   state the views -- her views up front in a

1   recommendation. It cannot do so if it doesn't know all

2   the facts. It cannot --

3   JUSTICE SOTOMAYOR: Could you tell me what

4   facts would affect the sentence here? The judge here

5   very clearly believed that some of the State charges

6   overlapped and some didn't. And so it ran some

7   consecutive to one set of State charges and concurrent

8   to the other.

9   What are the facts with respect to the

10   defendant that the Federal court needed to know?

11   MR. HAWKINS: Your Honor, I think in looking

12   at 3584, it may well seem reasonable for the Federal

13   court to have done this, but the -- the fact is, is that

14   Congress drew a bright line, and it has to be subject to

15   this undischarged term of imprisonment.

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   The case is submitted.

18   (Whereupon, at 11:05 a.m., the case in the

19   above-entitled matter was submitted.)

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